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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.L. et al., Persons Coming
Under the Juvenile Court Law.

D074794

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

(Super. Ct. No. EJ4170A, B)

Plaintiff and Respondent,

v.

RACHEL L.,

Defendant and Appellant,

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis,
Judge. Affirmed.

Marisa L.D. Conroy, under appointment by the Court of Appeal, for Defendant
and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel, and Hanna Tavill, Deputy County Counsel, for Plaintiff and Respondent.

Rachel L. (Mother) appeals from the juvenile court's orders denying her Welfare and Institutions Code section 388¹ modification petition and terminating parental rights as to her daughters H.L. and R.E. (together, the children). (§ 366.26.) She contends the juvenile court used the wrong standard to evaluate her modification petition and then erred in summarily denying the petition. She also claims the juvenile court erred in freeing the children for adoption because her bond with them outweighed the benefits of adoption. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Mother grew up in the foster care system from age 12, until age 18. Mother disclosed that she was a victim of human trafficking and began soliciting sex at age 13. Mother has had one job hosting at a restaurant, but quit because she could not handle the pressure.

In March 2016 law enforcement discovered Mother unresponsive in her apartment overdosed on Xanax. One-year-old H.L. was in her crib and there were alcohol bottles and lines of cocaine on a table. The San Diego County Health and Human Services Agency (the Agency) offered Mother voluntary services, however, she refused services and moved out of the county. In May 2016 San Luis Obispo County Child Welfare Services received a report that Mother attempted suicide in the presence of H.L. Mother admitted that she used marijuana and cocaine.

In September 2016 Mother was hospitalized after her boyfriend, Cordell E., punched her in the head multiple times as she drove. H.L. was in a car seat at the time

¹ Undesignated statutory references are to the Welfare and Institutions Code.

and Mother was pregnant with R.E. In October 2016 Mother and H.L.'s alleged father, Kellen L., argued outside their cars. When Kellen left, Mother followed him and rear-ended his car. She fled on foot with H.L. The Agency attempted to contact Mother, but she declined to meet with the social worker. Mother gave birth to R.E. in April 2017.

In June 2017 the Agency received a report that Mother brought H.L. to the hospital because of significant bruises on H.L.'s back and buttocks after H.L. had visited Kellen. Mother disclosed that Kellen was her pimp and that she allowed him to care for H.L. while she solicited sex. Later that month Mother got into a violent altercation with her boyfriend in the children's presence. A paternal aunt took the children to the hospital because the boyfriend had stepped on R.E.'s arm and H.L. suffered cuts after stepping on glass. H.L.'s examination revealed injuries consistent with physical abuse.

The Agency filed dependency petitions for the children and obtained protective custody warrants for them. The Agency placed the children with R.E.'s paternal grandparents (the grandparents). Kellen indicated that he was not interested in participating in the case, visiting with H.L., or engaging in services. Cordell, R.E.'s father, was incarcerated.

At the contested adjudication and disposition hearing in August 2017, the court sustained the petitions, removed the children from Mother and placed them with the grandparents. The Agency met with Mother on four occasions between October 2017 and January 2018. Mother enrolled in domestic violence programs but her attendance was inconsistent and then stopped. Mother did not initiate any other recommended services. In early November 2017 Mother entered a shelter for victims of human

trafficking, but she refused to comply with the rules and left after a week.

At the six-month review hearing in March 2018, the court found Mother had made no substantive progress in her case plan, terminated reunification services, and scheduled a section 366.26 hearing. In August 2018 Mother filed a section 388 petition requesting that the children be returned to her with family maintenance services, alternatively, for reinstatement of reunification services. The court denied the petition the following month finding that Mother had not made a prima facie showing of changed circumstances.

At the contested section 366.26 hearing in October 2018, the court found the beneficial-relationship exception did not apply, terminated parental rights, and identified a permanent plan of adoption. The court also designated the grandparents as prospective adoptive parents. Mother timely appealed from the denial of her section 388 petition and the termination of her parental rights.

DISCUSSION

I. *DENIAL MODIFICATION PETITION*

A. *General Legal Principles*

A parent may petition the court to modify a prior order by demonstrating that a change of circumstances or new evidence may require a new order, and that changing the prior order would be in the best interests of the child. (§ 388, subds. (a)(1), (d); *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529 (*Kimberly F.*)) In ruling on a section 388 petition, some of the factors the court should consider include: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that

problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Kimberly F.*, at p. 532.)

To obtain an evidentiary hearing on a section 388 petition, the petitioner must plead facts sufficient for a prima facie showing (1) the existence of "new evidence" or a "change of circumstance" since the prior juvenile court order, and (2) that altering the court's previous order is in the child's best interest. (§ 388, subd. (a); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In deciding whether a prima facie showing has been made the court may consider the entire factual and procedural history of the case. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616 (*Mickel O.*).

We review a summary denial of a hearing on a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.) " ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' ' ' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

B. *Analysis*

In her section 388 petition Mother requested that the juvenile court return the children to her with family maintenance services; alternatively, for reinstatement of reunification services. Mother contends the juvenile court abused its discretion and denied her due process when it summarily denied her petition because she presented new evidence or demonstrated changed circumstances, and showed that placing the children with her with family maintenance services was in the children's best interests. Mother also contends that reversal is required because the juvenile court applied the wrong legal standard in determining whether to grant a hearing on her modification petition.

We reject Mother's argument that the juvenile court applied an incorrect legal standard to the section 388 analysis and, thus, failed to appropriately exercise its discretion. "A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order." (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124-1125.)

In summarily denying the petition, the juvenile court stated, "I'm past the 12-month date, which was August 15th. In order to go to an 18-month date you have to make three very important findings, none of which I could make, even on a prima facie level." The court further stated:

"The thing that's very much lacking, and it causes me a great deal of concern, is this doesn't appear, considering mother's own victimization, to be something that's going to be solved in a month or two or three months. It appears that it's something that does need intensive therapy and very specialized types of situations, and there's just no evidence to indicate that there's some kind of a magic pill that's going to occur by the 18-month date

that would allow the mother to resolve all of her personal issues. [¶] There has been no therapy really to address these types of issues, and I can't find a prima facie showing of change of circumstances."

Mother contends that the court used the wrong standard when it considered the factors necessary to extend the proceeding to the 18-month date because this was not the legal question before the court. When a dependent child cannot be returned safely to the custody of a parent at the 12-month review, the juvenile court has discretion to extend the reunification period to the 18-month deadline only if: (1) reasonable services have not been provided to the parent; or (2) there is a substantial probability that the child can be returned to the physical custody of the parent and safely maintained in the home "within the extended period of time." (§ 366.21, subd. (g)(1).) The juvenile court may extend the reunification period to the 18-month statutory deadline pursuant to a finding that there is a substantial probability that the child will be returned to the parent within that extended period only if the following circumstances are all true: "(A) That the parent . . . has consistently and regularly contacted and visited with the child. [¶] (B) That the parent . . . has made significant progress in resolving problems that led to the child's removal from the home. [¶] (C) The parent . . . has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.21, subd. (g)(1)(A)-(C).)

The record does not support Mother's claim that the juvenile court undertook a section 366.21 analysis; rather, the trial court mentioned the three section 366.21 findings because granting the section 388 petition would require that the case be extended to the

18-month date.² The reporter's transcript shows that counsel argued the best interest and changed circumstances prongs for a section 388 petition to the juvenile court.

As another court noted, "section 388 merely authorizes the court to modify a prior order. It does not purport to excuse the juvenile court from satisfying any other legal requirements that might apply to the modification." (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1076.) The factors that a court reviews in deciding to extend a case to the 18-month date (visitation, parental progress, and completing objectives of case plan) are not inimical to the section 388 analysis which includes the strength of the parental bond and the parent's progress in ameliorating the problem that led to the dependency. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) Rather, in deciding whether a prima facie showing has been made, it is appropriate for the juvenile court to consider the entire factual and procedural history of the case (*Mickel O.*, *supra*, 197 Cal.App.4th at p. 616), including visitation, parental progress, and completing objectives of case plan. Here, the juvenile court did not err by considering the procedural posture, as well as the entire factual and procedural history of the case, in assessing Mother's section 388 petition.³

Mother claims that she made a prima facie showing of changed circumstances or new evidence by virtue of her involvement, on her own initiative, with the Bilateral Safety Corridor Coalition (BSCC) which provided her with the necessary resources and

² The hearing on the section 388 petition took place on September 12, 2018, one month after the 12-month date.

³ Because we find no error, we do not address the Agency's alternative argument that any possible error was invited when Mother expressly requested a reinstatement of reunification services to the 18-month date thereby impliedly invoking the statutory criteria required for such an extension of the reunification time frame.

tools to remove herself from human trafficking. Mother was also participating in the Wellness Connections 2020 program (2020 program) where she received one-on-one wellness coaching and attended classes such as positive relationships, mindful parenting, mindfulness, emotion regulation, interpersonal effectiveness and distress tolerance, and Dialectical Behavioral Therapy Skills. Mother was receiving mental health services through Center for Hope & Strength and addressing domestic violence issues and relationships. Mother also enrolled in the Systemic Training for Effective Parenting (STEP) Class. Last, Mother argued at the hearing that she had not had any relational domestic violence incidents since the initial incident alleged in the petition.

"A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 (*Edward H.*); *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157 (*G.B.*) [a prima facie showing is not made if the allegations would fail to sustain a favorable decision even if found true at a hearing].) Based on our review of the evidence, we conclude that the juvenile court properly found that Mother did not make a prima facie showing of changed circumstances.

The history of the case includes a statement from Mother that she had never been in a relationship where she had not been beaten. The sustained dependency petitions included an allegation that Mother exposed the children to domestic violence and the Agency's reports document four domestic violence incidents in the presence of one or both children. Although Mother claims that she has not had any "relational domestic

violence incidents since the initial incident alleged in the petition," the record does not support this assertion.

Approximately four months after the detention hearing, Mother was involved in a physical altercation with an ex-girlfriend and was later arrested. Mother never completed a domestic violence victim group treatment program, which was part of her original reunification plan. Nor has she begun a domestic violence perpetrator program as required for her criminal case. This evidence, standing alone, shows an insufficient change of circumstances on the primary issue that brought this case before the juvenile court.

Mother started participating in individual therapy with Center for Hope & Strength approximately one month before the hearing on the section 388 petition. The therapist indicated that she had met with Mother twice and could not provide any feedback regarding Mother's goals or progress in those goals. Additionally, while Mother ultimately enrolled in the STEP class, the class began about one month before the section 388 hearing. At the time of the hearing, Mother had been participating in the 2020 program for approximately three months. Mother's initial goals in the 2020 program were to maintain healthy relationships, enroll in college and obtain an internship preferably in the social work field. No information is provided regarding Mother's progress on these goals. Mother received a laudatory letter from her case manager at the BSCC stating that Mother was currently enrolled in college, parenting classes, therapy, and was receiving additional services through other organizations. Although the letter stated that a list with all the dates and services Mother received from BSCC and other

organizations was attached, this list is not part of the record on appeal.

We commend Mother for her initiative in seeking help and encourage her to continue her efforts. Mother, however, is at the beginning stages of an attempt to change her life and there are no assurances that she will be able to do so. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*) [petition alleging changing circumstances, rather than changed circumstances, is insufficient].) In fact, Mother was arrested for prostitution in April 2018 and she posted a status on social media in July 2018 suggesting that she continued to engage in prostitution. Because Mother failed to show changed circumstances that would justify the resumption of reunification services, we need not consider the best interests prong of the analysis. (*G.B., supra*, 227 Cal.App.4th at p. 1157 [parent seeking a modification under section 388 must show "*both* a change in circumstances or new evidence *and* the promotion of the child's best interests."].)⁴

Moreover, even assuming the petition had made a prima facie case of changed circumstances, it did not make a sufficient showing that further reunification services would advance the children's best interests, and it made no reference to how the proposed order would advance the children's interest in permanency and stability. The petition

⁴ Mother asserts that she could not utilize the services provided by the Agency during the dependency case because she had not yet received services to address her history of human trafficking. This contention is belied by the record. In July 2017 Mother told the social worker that she had previously been involved with the San Diego Youth Services STARS program, which works with Commercially Sexually Exploited Children. Mother expressed no interest in further participating in STARS services, claiming that she had completed services in their program and had outside support. In December 2017 Mother entered a shelter for victims of human trafficking, but she refused to comply with the rules and left after a week. If Mother had agreed to the terms of the program she could have had a place to live for several years and received help as a victim of human trafficking.

simply stated that the children were attached to her, would do better under her care, and she could offer the children unconditional love and a lifetime of commitment. These conclusory allegations are insufficient. (*Edward H.*, *supra*, 43 Cal.App.4th at p. 593.) These allegations also fail to establish how reopening reunification efforts would advance the children's need for permanency and stability. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206 [" 'A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests.' "].) Because Mother's petition failed to make a prima facie showing to trigger the right to proceed by way of a full hearing, we conclude that the juvenile court did not abuse its discretion in summarily denying the petition.

Finally, we reject Mother's argument that the juvenile court violated her due process rights by denying an evidentiary hearing on her section 388 petition. The entire dependency scheme—including the "escape mechanism" provided by section 388—protects parents' due process rights. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307, 309-310.) "The dependency scheme, when viewed as a whole, provides the parent due process and fundamental fairness while also accommodating the child's right to stability and permanency." (*Id.* at p. 307.) Our conclusion that the trial court did not err in summarily denying Mother's section 388 petition shows that the juvenile court did not violate the applicable statutory scheme, which scheme our California Supreme Court has held protects a parent's due process rights. Thus, there was no due process violation.

II. *BENEFICIAL RELATIONSHIP EXCEPTION*

A. *General Legal Principles*

Mother contends that her parental rights should not have been terminated because of the beneficial nature of her ongoing relationship with the children. (§ 366.26, subd. (c)(1)(B)(i).) We are not persuaded.

The permanency planning hearing aims "to end the uncertainty of foster care and allow the dependent child to form a long-lasting emotional attachment to a permanent caretaker." (*In re Emily L.* (1989) 212 Cal.App.3d 734, 742.) The primary consideration at the hearing is the best interests of the child. (*In re Kerry O.* (1989) 210 Cal.App.3d 326, 333.) At the permanency planning hearing the court has four choices, with termination of parental rights and ordering that the child be placed for adoption, as the first choice. (§ 366.26, subd. (b)(1).) Whenever the court finds "that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)), unless it finds one of four specified circumstances in which termination would be detrimental. (§ 366.26, subd. (c)(1)(A)-(D).) It is the parent's burden to show an exception to termination of parental rights. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466 (*Angel B.*).)

One of the exceptions to the preference for adoption is the beneficial parent-child relationship exception, which exists where a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a

permanent home with adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)). The parent must show that the parent-child relationship is such that the child will be greatly harmed by the termination of parental rights, so that the presumption in favor of adoption is overcome. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853-854 (*Brittany C.*)). Implicit in this standard is that "a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The existence of this relationship is determined by taking into consideration "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) We review the factual issue of the existence of a beneficial parental relationship under the substantial evidence standard of review and the determination of whether there is a compelling reason for finding that termination would be detrimental to the child under the abuse of discretion standard. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531.) We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. (*Autumn H.*, at p. 576.)

B. *Analysis*

Without discussion, Mother asserts that she consistently visited in person or through "FaceTime" with the children. The Agency disagrees. Our review of the record shows that Mother's visitation was inconsistent.

Mother initially engaged in at least two supervised visits with the children each week. Mother did not visit the children from August 2 through August 18 because it was " 'too hard' " and she "had a lot to do." Instead Mother spoke to H.L. daily using "FaceTime." In November 2017 Mother's visits became more consistent and she stayed for several hours at a time and helped with the children's daily routine. In December 2017 Mother was arrested and released in January 2018. From January 2018 through May 2018 Mother only visited about twice, although she did contact the children by social media messenger or telephone.

In June 2018 Mother resumed having regular weekly visitation. Since July 2018, Mother visited roughly once every other week and called a few times a week. Mother had three visits in August 2018. Mother never progressed to unsupervised visits. Sporadic and inconsistent visitation is insufficient to satisfy the first prong of the beneficial relationship exception. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324; *In re C.F.* (2011) 193 Cal.App.4th 549, 554 [parent's increased visitation as the section 366.26 hearing neared did not change the overall sporadic nature of the visits].)

Even if we assumed that Mother's visitation was regular, she cannot establish that (1) continuation of the parent-child relationship would promote the well-being of the children to such a degree as to outweigh the well-being they would gain in a permanent home with new, adoptive parents, or (2) termination of the parental relationship would be detrimental to the children. (*Angel B., supra*, 97 Cal.App.4th at p. 466.)

It is undisputed that Mother loves her children and that she acted appropriately during her supervised visitation. The ultimate question we must decide is whether

Mother overcame the presumption in favor of adoption by showing her relationship with her children is such that they would be greatly harmed by the termination of parental rights. (*Brittany C.*, *supra*, 76 Cal.App.4th at p. 853.) After reviewing the record, we conclude that Mother did not meet her burden of showing by a preponderance of the evidence that severing the parental relationship would result in great harm to the children.

The grandparents are "very committed" to adopting the children and have been approved for adoption. They are also open and willing to facilitate contact between the birth parents and the children. The grandparents have known H.L. since she was about a year old and have known R.E. her whole life. The grandparents stated that they feel " ' bonded' " to the children and the court appointed special advocate observed the grandparents as "loving caregivers who put great care into raising both girls." H.L. called Mother "Mommy" and was always happy to see her. The social worker, however, described the relationship between H.L. and Mother as "more like . . . a favorite relative." The social worker concluded that termination of Mother's parental rights would not cause significant detriment to H.L.'s well-being. R.E. initially displayed indifference to Mother, but eventually "warm[ed] up" to her. The social worker noted that R.E. did not treat Mother any differently than she would a friendly visitor and concluded that R.E. would suffer no detriment if Mother's parental rights were terminated. Significantly, both children are too young to understand the concept of a biological parent. (*Angel B.*, *supra*, 97 Cal.App.4th at pp. 459, 467 [two-year old child was "very young, too young to understand the concept of a biological parent"].)

The juvenile court was entitled to credit the assessments and conclusions of the social workers. (*Casey D.*, *supra*, 70 Cal App.4th at p. 53.) Moreover, "delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*Id.* at p. 47.) Given the lack of evidence that the children would be harmed if the parent-child relationship is severed, we conclude that the juvenile court did not err in determining that the beneficial relationship exception to adoption did not apply.

DISPOSITION

The orders are affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.